FILE COPY

SEP 9 1960

IN THE

Supreme Court of the United States

October Term, 1960

Nos. 60-61

POE, [illegible], and [illegible] LEE BUXTON,

Appellants,

v.

ABRAHAM S. ULLMAN, State's Attorney,

Appellee.

On Appeal from the Supreme Court of Errors of Connecticut

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CONNECTICUT CIVIL LIBERTIES UNION AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

Osmond K. Fraenkel,
120 Broadway,
New York, N. Y.

Jeremy E. Cullen,
[illegible] Lewis Street,
Hartford, Conn.

Attorneys for Amici

[illegible] Wallace,
[illegible] Emerson,
Melvin L. Wulf,
Of Counsel.

INDEX

PAGE

Motion for Leave to File Brief 1

Interest of Amici 2

Statutes Involved 3

Statement of the Case 4

Questions Presented 5

Summary of Argument 5

ARGUMENT:

I. Section 53-32 of the General Statutes of Connecticut, Revision of 1958, both on its face and as applied in this case, arbitrarily invades the privacy of appellants Poe and Doe and thereby violates the due process clause of the 14th Amendment 6

A. The Right to Privacy 6

B. Privacy and Due Process of Law 10

1. The Statute on its Face 10

2. The Statute as Applied 15

II. Sections 53-32 and 54-196 of the General Statutes of Connecticut, revision of 1958, on their face and as applied to appellant Buxton, unreasonably interfere with appellant's right to practice his profession, and thereby violate the due process clause of the 14th Amendment 17

CONCLUSION 21

Citations

PAGE

CASES:

Adair v. United States, 208 U. S. 161 ..... 9, 19
Allgeyer v. Louisiana, 165 U. S. 578 9
Berea College v. Kentucky, 211 U. S. 45 9
Commonwealth v. Corbett, 307 Mass. 17 15
Dent v. West Virginia, 129 U. S. 114 18
Jacobson v. Massachusetts, 197 U. S. 11 12
Lawton v. Steele, 152 U. S. 133 ..... 17, 19
Meyer v. Nebraska, 262 U. S. 390 ..... 10, 17, 19
Olmstead v. United States, 277 U. S. 438 6
Pierce v. Society of the Sisters of the Holy Names, 268 U. S. 510 11
Reynolds v. United States, 98 U. S. 145 11
Rochin v. California, 342 U. S. 165 9
Smith v. Texas, 233 U. S. 630 19
Sweezy v. New Hampshire, 354 U. S. 234 20
Tileston v. Ullman, 129 Conn. 84 15
Truax v. Raich, 239 U. S. 33 19
Viemester v. White, 179 N. Y. 235 12
West Virginia v. Barnette, 319 U. S. 624 10
Wieman v. Updegraff, 344 U. S. 183 21
Wolf v. Colorado, 338 U. S. 25 6

STATUTES:

Conn. General Statutes (Revision of 1958), 53-32 7
Conn. General Statutes (Revision of 1958), 19-52, 26-370, 17-32, 10-18, 53-304, 53-309 ..... 7, 18

MISCELLANEOUS:

Proceedings to Honor Judge Learned Hand, 264 F. 2d 6 7
U. S. Statistical Abstract (1959) 14
St. John Stevas, Birth Control and Public Policy (1960) 14

IN THE

Supreme Court of the United States

October Term, 1960

Nos. 60-61

POE, *et al.*, and C. LEE BUXTON,

Appellants,

—v.—

ABRAHAM S. ULLMAN, State's Attorney,

Appellee.

On Appeal from the Supreme Court of Errors of Connecticut

Motion for Leave to File a Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as *Amici Curiae*

The American Civil Liberties Union and its affiliate, the Connecticut Civil Liberties Union, respectfully move for leave to file a brief *amici curiae* in these cases. The attorney for appellants has consented to the filing. Appellee's attorney has refused consent. Both the consent and refusal have been filed with the Clerk of the Court.

The American Civil Liberties Union is a national non-political organization devoted solely to defending the civil liberties guaranteed by the constitutions of the United States and the several states. The Connecticut Civil Liberties Union is an affiliate group which concentrates on the civil liberties of the citizens of Connecticut.

For many years the Union maintained that state and federal laws which interfered with the dissemination of birth control information impaired the freedoms of speech and information protected by the First Amendment.

Motion for Leave to File a Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae

Subsequently the Union re-evaluated its policy and concluded in addition that any prohibition against the prescription, sale or use of birth control articles was a serious abridgement of the due process clauses of the Fifth and Fourteenth Amendments.

The Union believes that from the point of view of appellants Poe's and Doe's right to privacy and appellant Buxton's right to professional integrity, its brief can be of assistance to the Court in settling another dispute arising out of conflicting claims between a state and its citizens. The Union believes its brief covers ground not covered in appellants' brief.

The Union respectfully moves that it be granted leave to file the accompanying brief.

Osmond K. Fraenkel,
120 Broadway,
New York, N. Y.,

Jerome E. Caplan,
87 Lewis Street,
Hartford, Conn.,

Attorneys for Amici.

Rowland Watts,
Ruth Emerson,
Melvin L. Wulf,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1960

Nos. 60-61

POE, *et al.*, and C. LEE BUXTON,

Appellants,

—v.—

ABRAHAM S. ULLMAN, State's Attorney,

Appellee.

On Appeal from the Supreme Court of Errors of Connecticut

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CONNECTICUT CIVIL LIBERTIES UNION AS *AMICI CURIAE*

Interest of *Amici*

The interest of *amici* is set forth in the motion for leave to file.

Statutes Involved

General Statutes of Connecticut, Revision of 1958:

Section 53-32. Any person who uses any drug, medical article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned.

Section 54-196. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

Statement of the Case

Appellants Poe are husband and wife, 30 and 26 years old respectively. Mrs. Poe has had three consecutive pregnancies, each of which has terminated in an infant with multiple congenital abnormalities inconsistent with life. Another such pregnancy will be extremely disturbing to the physical and mental health of Mr. and Mrs. Poe (R. 2).[a]

Appellant Doe is a 25 year old housewife. She suffers from hypertensive cardiovascular disease, severe paresis of the right leg, total paralysis of the right arm, residual kidney damage, marked impairment of speech, and emotional instability. If appellant Doe became pregnant it would almost inevitably result in her death from hypertensive toxemia of pregnancy (R. 6).

Appellant Buxton is a licensed physician specializing in obstetrics and gynecology. He is Chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine and the Grace-New Haven Community Hospital (R. 10-11).

Both Mrs. Poe and Mrs. Doe have consulted Dr. Buxton for medical advice as to what preventative measures can be taken to avert the occurrence of the dangerous conditions described above (R. 12).

It is the opinion of Dr. Buxton that the best and safest medical advice which could be prescribed for Mrs. Poe and Mrs. Doe would be to inform them of methods of preventing conception. Dr. Buxton has knowledge of drugs, medicinal articles and instruments which in fact can be used in a safe, sanitary, and effective manner so as, without injury, to prevent conception and avert the dangerous consequences earlier described. The use of such drugs and instruments, from a medical standpoint, is indicated as the

[a] The designation "R." refers to the Record on Appeal.

best and safest preventative measure necessary for the protection and preservation of the health of appellants Poe and Doe (R. 2-3, 12).

Appellants Poe and Doe are unable to obtain this advice solely because the delivery and use of such advice may or will be claimed by the appellee, State's Attorney, to violate Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, and the appellee intends to prosecute any offense against said statutes, and claims that the giving of information and advice and the procurement and delivery of drugs, articles and instruments and the use thereof, would violate said statute (R. 3, 12).

Questions Presented

I. Whether Section 53-32, both on its face and as applied in this case, arbitrarily invades the privacy of appellants Poe and Doe and thereby violates the due process clause of the 14th Amendment.

II. Whether Sections 53-32 and 54-196, both on their face and as applied in this case, unreasonably interfere with appellant Buxton's right to practice his profession and thereby violate the due process clause of the 14th Amendment.

Summary of Argument

The 14th Amendment protects persons from invasions of their privacy by the states. The Connecticut statutes in issue, on their face, seek to regulate an aspect of marital conduct that is inherently private and beyond the reach of government. As applied, those statutes assert the power to withdraw from appellants the right to engage in sexual intercourse. This asserted power is in such complete conflict with accepted medical practice and with the vastly overwhelming practice of the community, that it is arbitrary and therefore unconstitutional.

These statutes also unreasonably interfere with appellant Buxton's right to practice his profession, a right protected by the 14th Amendment. Dr. Buxton's liberty is further infringed because the nature of his work is entitled to the special considerations expounded in *Sherbert v. New Hampshire*, 354 U. S. 234.

ARGUMENT

I

Section 53-32 of the General Statutes of Connecticut, Revision of 1958, both on its face and as applied in this case, arbitrarily invades the privacy of appellants Poe and Doe and thereby violates the due process clause of the 14th Amendment.

A. The Right to Privacy

The right to privacy is protected against invasion by the States through the 14th Amendment. *Wolf v. Colorado*, 338 U. S. 25. The Court there held that "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U. S. at 27.

It was Mr. Justice Brandeis' view that privacy was the keystone of the Constitution. Dissenting in *Olmstead v. United States*, 277 U. S. 438, 478, he said:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They know that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations.

> They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment."

Although the Court has often considered cases arising out of the application of the search and seizure provision of the Constitution to both the federal and state governments it has not had occasion to consider a case raising the question of the extent of the right to privacy in circumstances which touch the marrow of human behavior as presented in this case.

The invasion of privacy here is two-fold. First, the statute on its face restrains married couples from employing the most effective means of contraception when engaged in sexual intercourse. Secondly, as applied, the statute confronts appellants with the choice of engaging in sexual intercourse without contraceptive devices, thereby immediately threatening the life and health of the female spouses, or of abstaining entirely from sexual intercourse.

1. With respect to the first, it can be safely observed that marriage and the family are the foundations of our culture, and the focal points about which individual lives revolve.[1]

That certain aspects of marriage and family life are subject to the reasonable exercise of the police power is not in dispute, but that power is generally restricted to assuring minimum standards of care and education.[2] The

---

[1] Mr. Justice Frankfurter, commemorating Judge Learned Hand's fifty years of federal judicial service, said of Judge Hand that "he has achieved the one thing in life that makes all the rest bearable—a happy marriage." 264 F. 2d 21 (foreword).

[2] See, *e.g.*, Connecticut General Statutes, Revision of 1958, § 17-32 *et seq.* (Dependent and Neglected Children); § 53-304 (Non-support); § 53-309 (Abandonment); § 10-184 (School Attendance; Duties of Parents).

incidents of marriage and family life that are the private concern of the family itself, and consequently beyond the reach of the government, are numerically overwhelming.

Among those inviolable incidents of marriage, and the human love on which it is based, is the right to express that love through sexual union, and the right to bear and raise a family. No other rights are entitled to greater privacy than that normally bestowed upon the acts of intercourse and procreation. Nonetheless, Connecticut has presumed to assert the power to regulate the conduct of its citizens by notifying them that although the state will tolerate sexual intercourse between spouses, it will not tolerate such intercourse, unless they abstain from the practice of regulating the frequency of pregnancy. They must, says Connecticut, forbear from planning the size of their family regardless of their physical condition, their desires or their means.

2. As applied in this case, the unreasonableness of the Connecticut statute is manifestly established. As stated above, a husband and wife, resident in Connecticut, who can procreate and bear children without undue danger, may engage in sexual intercourse or not, contingent upon their willingness to take the chance that pregnancy will occur. Appellants Poe and Doe, however, have no such choice. In each case, pregnancy will pose an immediate threat to the health of the mother; in one case the mother's death is likely to result. The choice here is no choice at all, because if the most effective means of contraception is denied these appellants, they must forbear from sexual intercourse entirely.

To paraphrase Mr. Justice Brandeis, if Connecticut would leave the appellants alone, they would be able to obtain the most effective means of contraception, and engage in sexual intercourse. But Connecticut has so far invaded appellants' privacy that they are foreclosed from engaging in the natural expression of their love.

It is unnecessary to expatiate upon the nature of the liberty which Connecticut has arbitrarily denied to appellants. It is a private expression of love which should properly be beyond invasion or abridgment by the government. "This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.' *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Adair* v. *United States*, 208 U. S. 161, 173." *Berea College* v. *Kentucky*, 211 U. S. 45, 67-69 (Harlan J., dissenting).

3. This case is not unlike *Rochin* v. *California*, 342 U. S. 165. There, police officers, having some information that Rochin was selling narcotics, broke into his house, entered his bedroom where he was sitting partly dressed on the side of his bed, upon which his wife was lying, and attempted unsuccessfully to extract some capsules he had put in his mouth when the police entered the room. They then took Rochin to a hospital, had his stomach pumped and retrieved the capsules which proved to contain morphine. The capsules were admitted at trial over petitioners objections.

This Court reversed the conviction, finding that the conduct of the police "shock[ed] the conscience," offended "a sense of justice," and violated "decencies of civilized conduct,"[2a] and therefore violated the due process clause of the 14th Amendment. The power asserted by Connecticut to withdraw from its citizens the right freely to use effective means of contraception and thereby limit the size of their family in accordance with their personal choice, or to withdraw from appellants the right to engage in sexual intercourse without threatening the health or lives of the female spouses, evokes the same quality of outrage to civilized sensibilities as did the power asserted in *Rochin*. The shocking nature of the exercise of state power is, perhaps, greater here than in *Rochin*.

[2a] 342 U. S. at 172, 173.

Appellants want only to enjoy their mutual love and affection without any interference by the State. The right to which they claim title intrudes not at all upon any valid interest or conflicting right of their fellow citizens. They assert this right to be one of those which "may not be submitted to vote * * * [and] depend[s] on the outcome of no elections."[3] In short, they want legislators as well as policemen to stay out of their bedrooms.

B. Privacy and Due Process of Law.

1. The Statute on its Face.

Although the nature of the constitutional right to privacy has generally been discussed by this Court in its application to questions of search and seizure, four cases decided here raise related considerations, not necessarily in the context of the right to privacy, but within the general framework of a conflict between the police power of the state and a private right related to conjugal or domestic matters.

In *Meyer* v. *Nebraska*, 262 U. S. 390, a state statute forbidding foreign languages to be taught in primary schools within the state was held arbitrary and in violation of the 14th Amendment. In the course of its opinion the court described the "liberty" guaranteed by the 14th Amendment as follows:

> "Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." At 399.

---

[3] *West Virginia* v. *Barnette*, 319 U. S. 624, 638.

In *Pierce v. Society of the Sisters of the Holy Names*, 268 U. S. 510, this Court struck down as contrary to the due process clause of the 14th Amendment, a state statute which required children between the ages of eight and sixteen to attend public schools. The Court said:

> "We think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the up-bringing and education of children under their control. * * * The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." At 534-35.

Meyers and *Pierce* sustain the conclusion that the law, to a large extent, regards marriage and the family as the ultimate repository of personal freedom, and that the power vested in husband and wife to conduct the affairs of their family free of state interference is virtually plenary.

The relatively narrow area of control left to the government[4] may not be exercised arbitrarily and, as stated in *Pierce*, when that power is exercised it must have a "reasonable relation to some purpose within the competency of the state".[5] With this limitation in mind, we shall discuss two cases, each of which, although affirming the power of the state to qualify somehow the liberty of the person, affords significant guidelines for measuring the constitutionality of the power asserted in this case.

In *Reynolds v. United States*, 98 U. S. 145, this Court affirmed a conviction for bigamy against a member of the

---

[4] See, *e.g.*, note 2, *supra*.

[5] 268 U. S. at 535.

Church of the Latter Day Saints brought under a federal statute which the defendant claimed violated the constitutional guarantee of the free exercise of religion. Tracing the persistence of monogamy from ancient times through the Common Law, the Court, in affirming the conviction, relied primarily upon the high place held by monogamy in the culture of the western world, and concluded that "* * * it may safely be stated there has never been a time in any state of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity." 98 U. S. at 165.

In *Jacobson* v. *Massachusetts*, 197 U. S. 11, plaintiff in error was convicted, pursuant to a state statute, of refusing to be vaccinated subsequent to the adoption of a regulation by the board of health of the city of Cambridge that in its opinion the public health and safety required the vaccination or re-vaccination of all the city's residents. He claimed the Massachusetts statute violated the due process clause of the 14th Amendment.

At trial, plaintiff in error's offer of proof relating to the alleged injurious or dangerous effects of vaccination was rejected. Describing the offers of proof as having "no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body," at 30, Mr. Justice Harlan said, "*What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority.*" *Ibid.* (Emphasis supplied.) It was on the basis of this judgment that the court concluded that the statute was not in "palpable conflict with the Constitution." At 31.

The court also quoted with approval the following language from a then recent New York case, *Viemester* v. *White*, 179 N. Y. 235:

> "While [vaccination] is not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state, and in most civilized nations for generations. It is generally accepted in theory, and generally applied in practise both by the voluntary action of the people, and in obedience to the command of the law. Nearly every state in the Union has statutes to encourage, or directly or indirectly to require, vaccination; and this is true of most nations in Europe * * *. A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the Legislature and the courts * * *."

Reynolds and *Jacobson*, therefore, stand for the proposition that where a norm of conduct reflects the overwhelmingly prevailing ethic or belief of the community, legislation which implements that view is reasonable almost by definition. More particularly, *Jacobson* stands for the further proposition that a compelling standard to be used in judging the reasonableness of legislation that purports to regulate the health or general welfare of the community is whether the means employed accord with the consensus of opinion of the experts in the field of science to which the measure relates.

Moreover, in each of those cases the matter regulated had a public aspect—in the one case the flaunting of multiple wives, in the other the possible infection of others. Here no such public interest exists.

Although overwhelming lay opinion or belief is not sufficient by itself to determine the reasonableness of legislation, where such opinion or belief coincides with the opinion of experts in the science to which the legislation relates, the area of reasonableness within which the legislature may operate is narrower than normal, both practically and constitutionally. For example, the opinion of the lay and scientific community concerning the efficacy of antibiotics is no doubt virtually unanimously favorable. One

is hard put to imagine that state legislation prohibiting the use of such drugs would not be struck down today as patently arbitrary and capricious.

From a medical standpoint, the safety and utility of contraceptives in general, and the vaginal diaphragm in particular, are beyond dispute.[6] That they in fact contribute to physical and emotional health is dramatically illustrated by the facts of this case. This view is shared by the community at large.[7]

From the moral or ethical standpoint,[7a] if the use of contraceptives were as taboo in our society as polygamy, the reasonableness of state legislation restricting their use could be well argued on the authority of the *Reynolds* case. But that is not the case. On the contrary, birth control through contraceptives devices is not only widely practised but far from being *malum in se*, is not even prohibited in forty-five of the fifty states.[8]

If any proof other than common experience and observation is required to show that birth control is generally practiced in the United States, it is instructive to note that of 43,714,000 family units in the nation, all but 2,648,000 are composed of six or less persons including parents, children, and other relations who might be in residence.[9] Indeed, approximately seventy-five per cent of all family units, all but 11,045,000, are composed of four people or less.[10] It is fair to assume from this data that the relatively

---

[6] Appellants' brief; *passim.*

[7] See, *e.g.*, St. John Stevas, *Birth Control and Public Policy* (Fund for the Republic, 1960) 26-28.

[7a] The court below grounded its decision in part upon the power of the state to "guard the public morals" (R. 29).

[8] The statutes are collected in St. John-Stevas, op. cit., *supra*, at 82-83. Twenty states and the District of Columbia have no laws whatever interfering with the sale of contraceptives; seventeen states permit contraceptives to be sold on medical prescription; eight states forbid only advertising of contraceptives.

[9] United States Statistical Abstract. 1959, p. 43.

[10] *Ibid.*

small size of the average American family is not attributable to chance.

Further proof of the arbitrary nature of the statutes in issue is adduced from the bemusing fact that condoms, which may be used to prevent veneral disease, are available within the state.[11] If these statues are intended to regulate the moral conduct of Connecticut's citizens, one can only wonder how the Legislature rationalizes the availability of this device which prevents conception as well as disease and which is the kind of device that one bent on immorality can secure with the greatest of ease.

2. The Statute as Applied.

The opinion of the Court in *Jacobson* v. *Massachusetts* is remarkably prophetic as applied to the facts of this case. The following extended quotation from that case speaks for itself.

> "Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended,

[11] See *Tileston* v. *Ullman*, 129 Conn. 84, citing with apparent approval *Commonwealth* v. *Corbett*, 307 Mass. 17.

that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. 'All laws,' this court has said, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' *United States* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517. Until otherwise informed by the highest court of Massachusetts we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death. No such case is here presented. It is the cause of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease." 197 U. S. at 38, 39.

The caveat laid down by Mr. Justice Harlan applies precisely to the facts of this case.

II

Sections 53-32 and 54-196 of the General Statutes of Connecticut, revision of 1958, on their face and as applied to appellant Buxton, unreasonably interfere with appellant's right to practice his profession, and thereby violate the due process clause of the 14th Amendment.

The constitutional provision here invoked by the appellant was described by this Court in the following terms in *Meyer* v. *Nebraska*, 262 U. S. 390 (1923) (quoted in part above) where the statute in question limited the teaching of foreign languages in primary schools.

> "While the court has not attempted to define with exactness the liberty thus guaranteed by the [14th Amendment], the terms has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen • • • [citation of cases]. The established doctrine may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. *Lawton* v. *Steele*, 152 U. S. 133, 137." [1]

Medicine, like education, is subject to reasonable regulation by the state because it significantly affects the

[1] *Meyer* v. *Nebraska*, at 399-400.

welfare of the community at large. The legislative power must, of course, be reasonably exercised in all cases, but particularly so with respect to measures peculiarly within the expertise of a scientific profession.

The principle regulations imposed by the state relating to the practice of medicine are those which require a demonstration of adequate knowledge and skill before a physician may treat the public.[2] Such regulations are, of course, necessary and reasonable.

> "Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other as well as their influence upon the mind. * * * " *Dent* v. *West Virginia*, 129 U. S. 114, 122 (1889).

The standards set down by, and the administration of, such regulations of course are those of the medical profession itself,[3] since laymen of the state legislature would not presume to judge the professional qualifications of a man claiming the right to practice medicine.

After being licensed, a physician may legitimately be required to submit to other kinds of regulation. He is required, for example, to keep records of his dispensation of narcotics.[4]

In these instances the regulation is intended either to protect the public from treatment which does not meet generally accepted modern medical standards, or to restrict

---

[2] Connecticut General Statutes, Revision of 1958, Title 20, Ch. 370.

[3] *Ibid.*

[4] Conn. Gen. Stat., § 19-252.

the use of a potentially dangerous substance to the purposes approved by medical science. In none of these regulations does the state attempt to interfere with the right of the licensed physician to treat his patients in accordance with his best medical judgment or substitute its judgment in a medical matter for that of the physician. As this Court pointed out in the *Dent* case:

> "The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications • • •" *Dent* v. *West Virginia, supra,* at 222-223.

The right of a physician to practice his profession without unnecessary interference by the state, like the right of every man "to work for a living in the common occupations of the community • • • [is] of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax* v. *Raich* 239 U. S. 33 (1915). See also *Meyer* v. *Nebraska, supra,* at 399; *Smith* v. *Texas,* 233 U. S. 630, 636 (1914); *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589-90 (1897); *Lawton* v. *Steele, supra.*

But it is more than this. Because the physician is engaged in a practicing science, his profession shares some of the special needs for freedom of inquiry and practice which come under the name of academic freedom. The preservation of this spirit of free inquiry is as vital to the development of medical science as it is to academic freedom. In medicine as in education "it is important • • • to attract men of the greatest capacity, and to

encourage them to exercise their independent judgment."[5] As this Court has said, academic freedom is an area "in which the government should be extremely reticent to tread." *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957).

The necessity of strong justification for such presumptively harmful action by the state was pointed out by Justice Frankfurter in the *Sweezy* case:[6]

> "Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling. * * *
>
> 'Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scien-

[5] Testimony of Robert M. Hutchins, Associate Director of the Ford Foundation, November 25, 1952, in Hearings before the House Select Committee to Investigate Tax-exempt Foundations and Comparable Organizations, pursuant to HR561, 82nd Cong., 2d Sess., quoted by Justice Frankfurter in *Wieman* v. *Updegraff*, 344 U. S. 183, 197 (1952).

[6] 354 U. S. at 261-263.

tific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university. • • • ,

See also *Wieman* v. *Updegraff*, 344 U. S. 183, 195-98 (1952).

CONCLUSION

The judgment of the Supreme Court of Errors of Connecticut should be reversed.

Respectfully submitted,

OSMOND K. FRAENKEL,
120 Broadway,
New York, N. Y.,

JEROME E. CAPLAN,
37 Lewis Street,
Hartford, Conn.,

Attorneys for Amici.

ROWLAND WATTS,
RUTH EMERSON,
MELVIN L. WULF,
Of Counsel.